PACIFIC & ORIENT INSURANCE CO BHD v. TANG LOON PAU & ORS

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[CIVIL APPEAL NO: BA-12B-135-09-2019]
30 JULY 2021

INSURANCE: *Liability – Road accident – Apportionment of liability – Insurance company appealed against decision of Sessions Court Judge ('SCJ') allowing plaintiffs' claim against defendants for hit and run accident involving motorcycle ridden by plaintiff and deceased wife – Whether first defendant's car hit plaintiff's motorcycle – Whether plaintiffs discharged burden of proof and proved on balance of probabilities its case against defendants – Defendants chose to submit no case to answer – Discrepancies in evidence – Whether SCJ had sufficient judicial appreciation of evidence – Whether finding of 100% liability against defendants ought to be set aside*

ROAD TRAFFIC: *Accident – Liability – Apportionment of liability – Insurance company appealed against decision of Sessions Court Judge ('SCJ') allowing plaintiffs' claim against defendants for hit and run accident involving motorcycle ridden by plaintiff and deceased wife – Whether first defendant's car hit plaintiff's motorcycle – Whether plaintiffs discharged burden of proof and proved on balance of probabilities its case against defendants – Defendants chose to submit no case to answer – Discrepancies in evidence – Whether SCJ had sufficient judicial appreciation of evidence – Whether finding of 100% liability against defendants ought to be set aside*

ROAD TRAFFIC: *Accident – Damages – Quantum of – Claim for – Dislocation to first plaintiff's right patella and injury to knee ligaments – Whether caused by accident – Whether claim for first plaintiff's loss of earnings allowed*

This was an appeal by the appellant against the decision of the Sessions Court Judge ('SCJ') allowing the plaintiffs' claim against the defendants for a 'hit and run' accident on 2 September 2015 which allegedly involved a motorcycle ridden by the first plaintiff and his wife ('the deceased') and the motorcar WLD 9999 owned by the first defendant and insured by the appellant. The plaintiffs filed a claim against the defendants for general damages for injuries suffered by the first plaintiff as a result of the accident, damages for bereavement under s. 7(3A) of the Civil Law Act 1956 for the second to sixth plaintiffs as the husband and children of the deceased and special damages. The appellant, who was the insurer of the motorcar owned by the first defendant, intervened in the trial as it believed that there were elements of fraud in the plaintiffs' claim against the first defendant. The salient facts showed that the first plaintiff had made police reports after the accident, stating that his motorbike was hit from the back by a motorcar that

he did not know the make and registration number of and that his brothers in law had hit him on the forehead and mouth because they alleged that he had caused the death of his wife – their sister. During the trial, the first plaintiff testified that he was given a note of the registration number of the first defendant's car by a member of the public. The investigation officer, who was the plaintiff's witness ('SP3') testified that he had been informed by a tow-truck driver that the motorcar that had hit the first plaintiff's motorcycle was 'Ruzaini's car'. SP3 later discovered that the motorcar mentioned by the tow-truck driver did not belong to Ruzaini but to his brother, the first defendant. SP3 did not take a statement from the first defendant. SP3 said that he went to the accident site and found no evidence showing the involvement of motorcar WLD 9999 in the accident and he did not interview anyone at the accident site. All he found at the site was a black coloured Toyota mudguard while the motorcar WLD 9999 was a cream/white MyVi. SP3 testified that the police found that the damages to the motorcar WLD 9999 to be inconsistent with the damages to the motorcycle and the result of the inquest investigation was 'no further action' (NFA) for the motorcar WLD 9999 as it was found that the said motorcar was not involved in the accident with the first plaintiff's motorcycle. At the close of the plaintiffs' case, the defendants took the position that based on the testimony of the plaintiffs' witnesses and the evidence before the court, the plaintiffs had failed to prove on a balance of probabilities that their pleaded case that the accident took place on 2 September 2015 and that the accident was caused by the first defendant's motorcar WLD 9999 colliding into the first plaintiff's motorcycle. The defendants then submitted that they had no case to answer and elected not to call any witnesses or tender any evidence. The SCJ held that by reason of the defendants choosing to submit that they had no case to answer, they had expressly abandoned their defence to the plaintiffs' claim. The SCJ also made an adverse inference under s. 114(g) of the Evidence Act 1950 against the defendants for submitting that it had no case to answer and in failing to produce the first defendant as a witness. Therefore, the SCJ held that the plaintiffs had, on a balance of probabilities, proved their case against the defendants and that the defendants were 100% liable for the accident and for the injuries suffered by the first plaintiff and for the death of his wife. The SCJ awarded the plaintiffs general damages in the sum of RM33,750, bereavement damages in the sum of RM10,000 and special damages in the sum of RM135,287. The appellant appealed against the SCJ's finding of liability against the defendants and the quantum of damages awarded to the first plaintiff for (i) dislocation of his right patella and injury to his knee ligaments; and (ii) full loss of earnings. The main issues for this court's determination were (i) whether the SCJ had sufficient judicial appreciation of the evidence when she concluded that the motorcar WLD 9999 was involved in the accident; (ii) whether she had sufficient appreciation of the law when she held that the plaintiffs had discharged its

burden of proof and proven on a balance of probabilities its case against the defendants because the defendants had chosen to submit that it had no case to answer at the close of the plaintiffs' case; and (iii) was the SCJ correct at law in making an adverse inference against the appellant for not producing the first defendant as a witness.

Held (allowing appeal against SCJ's finding of liability; dismissing appeal against quantum of damages awarded for first plaintiff's right patella dislocation, knee ligament injury and loss of earnings):

(1) The fact that a defendant submitted that it had no case to answer and called no witnesses and led no evidence did not absolve the plaintiff from discharging its burden of proof in law. The burden remained with the plaintiff to prove its case before a court could grant judgment on its claim. The fact that the defendant did not call any witnesses did not automatically equate to the plaintiff satisfying the burden of proof. Notwithstanding the defendant's submission of no case to answer, it still remained that the evidence adduced by the plaintiff must be sufficient to prove the plaintiff's case. Additionally, the SCJ's drawing of adverse inference against the defendants for having elected not to call any witnesses was also wrong at law since the plaintiffs had not proven its case against the defendants on a balance of probabilities. The plaintiff in an accident case must discharge his burden of proof and prove on a balance of probabilities that the accident was caused by the defendant and that the injuries and damages he suffered were a result of and/or caused by the accident, as required under s. 101 of the Evidence Act 1950. It was only after the plaintiff had discharged his burden of proof and proved his case on a balance of probabilities would the burden of proof shift onto the insurance company to prove its allegation of fraud. For all these reasons, the SCJ did not have a sufficient appreciation of the applicable law and was plainly wrong at law. (paras 33 & 36-38)

(2) The first plaintiff's own testimony and the documents admitted as evidence in court all showed that the accident took place on 3 September 2015. The SCJ was plainly wrong in arriving at her finding that the accident took place on 2 September 2015 based on the investigation officer's ('IO') investigation when the IO himself testified in court that 11.30pm on 2 September 2015 was not the time and date of the accident but the time and date that the first plaintiff stated in his first police report that he and his wife were riding the motorcycle from his home to Hospital Tanjung Karang. It was clearly wrong for the SCJ to conclude the date of the accident based on the IO's statement, which he had testified was based on his misreading of the first plaintiff's entry in the first police report. Additionally, it was clearly wrong for the SCJ to dismiss the first plaintiff's testimony in court and the written evidence in the medical reports exhibited in court that the accident took place on

A 3 September 2015 on the basis that the first plaintiff was under the influence of alcohol when he saw the medical officer (SP2) at the hospital after the accident. The basis of her rejection of the evidence were plainly wrong since the first plaintiff was not under the influence of alcohol when he told the doctor at Klinik Anita on 1 October 2015 B that the accident happened on 3 September 2015. Neither was he under the influence of alcohol when he told SP8 on 1 March 2016 that the accident happened on 3 September 2015 or when he testified in court during the trial that the accident took place on 3 September 2015. In light of the available evidence before her, the SCJ's finding that the C accident took place on 2 September 2015 was plainly wrong as it was a finding which could not be reasonably explained or justified. (paras 50-52)

(3) The first plaintiff's story, as to whether he was the rider or the pillion rider of the motorcycle at the time of the accident, kept changing. As D with the date of the accident, the SCJ had brushed aside the discrepancy in evidence as to whether the first plaintiff was the rider or pillion rider. It would have been impossible for SP3 to conclude from what he found at the site of the accident as to who was the rider and who was the pillion rider as all that SP3 found was the motorcycle and the motorcycle E number. SP3 was also unable to identify the exact spot where the body of the deceased was taken from as the latter was not at the location of the accident when he arrived. It was plainly wrong of the SCJ to have made the finding that the first plaintiff was the rider and his deceased wife was the pillion rider at the time of the accident. The SCJ did not have sufficient judicial appreciation of the evidence before the court. F (paras 59-62 & 65)

(4) It was indeed curious how the SCJ arrived at her conclusion that the motorcar WLD 9999 was involved in the accident with the first plaintiff's motorcycle, in the face of the evidence before the Sessions Court that the first plaintiff did not know what car had collided into his G motorcycle during the accident; that there was no trace of the motorcar WLD 9999 at the site of the accident; SP3's testimony that the damage to motorcar WLD 9999 was inconsistent with the damage to the first plaintiff's motorcycle; the police findings that motorcar WLD 9999 was not involved in the accident; and the result of the inquest investigation H confirmed "no further action" (NFA) was to be taken for motorcar WLD 9999 in respect of the accident. In arriving at her conclusion, the SCJ chose to ignore the oral evidence of the plaintiffs' own witnesses, the police reports filed by the first plaintiffs, the findings of the police and the result of the inquest investigation. It was patently clear that the I plaintiffs had not discharged the burden of proving its pleaded case against the defendants. (paras 77-79)

(5) The plaintiffs had failed to prove on a balance of probabilities that the accident happened on 2 September 2015; the first plaintiff was the rider and his deceased wife the pillion rider of his motorcycle BMB 5813; and that the motorcar WLD 9999 owned by the first defendant had collided into the back of the first plaintiff motorcycle causing the injuries, loss and damage to the first plaintiff and the death of his wife. The SCJ was thus plainly wrong in concluding otherwise. The SCJ erred in finding that the plaintiffs had proven its case against the defendants and for holding that the defendants were 100% liable for the accident. Accordingly, her finding of 100% liability against the defendants merited appellate intervention and should be set aside. (paras 80-82)

(6) As for the quantum of damages, the time of just under one month between the accident and the plaintiff being diagnosed as suffering from a right patella dislocation did not amount to an inordinate delay. The plaintiffs had proven on a balance of probabilities that the dislocation to the first plaintiff's right patella and the injury to his knee ligaments were caused by the accident. However, this court did not agree with the SCJ's finding that the assault by his brothers-in-law was an intervening event. The first plaintiff had reported that the assault by his brothers-in-law was on his forehead and mouth. The assault was not in his legs or knees. The assault was not an intervening event that could have caused the dislocation to the first plaintiff's right patella and knee ligament injury instead of the accident. (para 90)

(7) With regards to the first plaintiff's loss of earnings, the SCJ was not wrong to conclude based on the evidence given by the representative of the first plaintiff's employer that he was earning RM3,300 per month as a cook. She was also not wrong in deducting 1/3 of the earnings for his living expenses and applying a multiplier of five years. Based on the evidence before the court, including the testimony of his employer's representative and the medical expert, that the first plaintiff's job as a cook required him to stand for long periods of time and because of the injury to his knee he was no longer able to do so. Hence, it would no longer be possible for him to continue working as a cook. Accordingly, there should not be any appellate intervention in the sum of RM132,000 awarded by the SCJ for the first plaintiff's loss of earnings. (paras 92 & 93)

Case(s) referred to:

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Kalai Selvan Arumugam v. Santran Supramaniam & Anor [2016] 1 LNS 1624 CA ***(refd)***
Low Kian Boon & Anor v. PP [2010] 5 CLJ 489 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

A *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037 FC* ***(refd)***

Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

B **Legislation referred to:**

Civil Law Act 1956, s. 7(3A)

Criminal Procedure Code, s. 112

Evidence Act 1950, ss. 101, 102, 103, 114(g)

For the appellant - Archana Devi Thirumalai & Ratnavathy Navaratnam; M/s Viknes Ratna & Co

C *For the 1st-6th respondents - Khairul Aiman Kamar Rozaman; M/s G Dorai & Co*

[Editor's note: Appeal from Sessions Court, Civil Appeal No: BL-A53KJ-199-05-2018 (overruled in part).]

Reported by Suhainah Wahiduddin

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JUDGMENT

Faizah Jamaludin J:

Introduction

E **[1]** This is an appeal by Pacific & Orient Insurance Co Bhd ("the appellant") against the decision of the learned Klang Sessions Court Judge ("SCJ") allowing the plaintiffs' claim against the defendants for a "hit and run" accident that took place at KM 59, Jalan Klang-Teluk Intan, Kuala Selangor on 2 September 2015, which allegedly involved motorcycle no. BMB 5813 ridden by the first plaintiff and his wife, Tan Kiok Sit (the F deceased), and the motorcar no. WLD 9999 owned by the first defendant and insured by the appellant, who was the second defendant in the action in the Sessions Court.

[2] The plaintiffs had filed a claim against the defendants for general G damages for injuries suffered by the first plaintiff as a result of the accident, damages for bereavement under s. 7(3A) of the Civil Law Act 1956 for the second-sixth plaintiffs as the husband and children of Tan Kiok Sit (deceased) and special damages.

[3] The appellant, who was the insurer of the motorcar registration no. H WLD 9999 owned by the first defendant, had intervened in the trial as it believed that there were elements of fraud in the plaintiffs' claim against the first defendant.

[4] The SCJ, after full trial, had found the defendants to be 100% liable for the accident and had awarded the plaintiffs general damages in the sum I of RM33,750, bereavement damages in the sum of RM10,000, and special damages in the sum of RM135,287.

[5] The appellant is appealing against the SCJ's finding of liability against the defendants and the quantum of damages awarded to the first plaintiff for (i) dislocation of his right patella and injury to his knee ligaments; and (ii) full loss of earnings.

[6] The appellant had presented 19 grounds of appeal in its memorandum of appeal, with its main grounds of appeal being that the learned SCJ had erred in fact and law in concluding that the first defendant was 100% liable for the accident even though the plaintiffs had failed to prove on a balance of probabilities the involvement of the motorcar no. WLD 9999 belonging to the first defendant, in the said accident.

[7] As regards the damages awarded, the appellant's main grounds of appeal are that quantum of damages awarded by the learned SCJ was too high, in that it was not in line with current trends; that the SCJ had failed to take into account that the plaintiffs had failed to prove the causal link between the injuries suffered by the first plaintiff with the accident; that the dislocation of patella was only known a month after the accident; and in allowing the first plaintiff's claim for loss of earnings when there was no conclusive proof that the accident had caused his inability to work.

[8] For the reasons set out in this judgment, I found that based on the evidence before the court, the learned SCJ had erred in fact and in law and was plainly wrong in concluding that plaintiffs had discharged their burden of proof in proving on a balance of probabilities that the accident took place on 2 September 2015 and that the first defendant's motorcar no. WLD 9999 was the car that had hit the first plaintiff's motorcycle during the accident. I also found the SCJ was wrong in law to conclude that the plaintiffs had discharged its burden of proof and had proven its case on a balance of probabilities by reason of the defendants' submission that they had no case to answer at the close of the plaintiffs' case.

[9] For these reasons, I concluded that this appeal merited appellate intervention and accordingly, set aside the SCJ's finding of liability against the defendants.

[10] I dismissed the appellant's appeal on the damages awarded to the first plaintiff for (i) right patella dislocation and knee ligaments injury; and (ii) full loss of earnings. I found that that the learned SCJ had not erred either in fact or in law in finding that the first plaintiff had suffered dislocation of his right patella and had injured his knee ligaments because of the accident. Also, the award of the sum of RM14,500 for the patella injury and RM18,000 for his knee ligament injury was not excessive since it was within the recommended range for the said injuries in the Revised Compendium of Personal Injury Awards. Further, I found that that the learned SCJ had not erred in awarding full loss of earnings to the first plaintiff. Because of the injury to his knee resulting in him being unable to stand for long periods of time, it would not be possible for him to continue working as a cook.

[11] The full reasons for the court's decision are set out herein.

Salient Facts

[12] The first plaintiff had filed two police reports after the accident. Both reports were filed on 3 September 2015. The first police report was filed at 16:50pm to report the accident. The first plaintiff stated in the first police report that his motorbike was hit from the back by a motorcar that he did not know the make and registration number of the motorcar that had hit his motorcycle. The second police report was filed at 18pm, where the first plaintiff reported that his brothers-in-law came to the Hospital Tanjung at around 2.30am on 3 September 2015 and had hit him on the forehead and mouth. He reported that they had also hit his four children. They alleged that he had caused the death of his wife – their sister.

[13] During the trial, the first plaintiff testified that he was given a note of the registration number of the first defendant's car by a member of public at Hospital Tanjung Karang. He also testified that one of the members of the public had sent to his handphone a photograph of motorcar no. WLD 9999 *via* WhatsApp. But when asked during cross-examination what was the name of the person who gave him the note, the first plaintiff said he did not know; when asked on what day was he given the note, the first plaintiff replied he could not remember. As for the photo of car, which he claimed was sent *via* a WhatsApp message to him, the first plaintiff informed the court that he had deleted the photo and he did not know the name of the person who had sent the photo to him.

[14] The first plaintiff said that he was brought by a Chinese person to the police station to make both police reports. When asked during cross-examination, the first plaintiff said that he did not ask the name and telephone number of the Chinese person who had brought him to the police station on 3 September 2021 to make both police reports.

[15] The investigation officer ("IO"), who was the plaintiffs' third witness ("SP3"), testified during the trial that he was informed by a tow-truck driver named "Ah Wei" that the motorcar that had hit the first plaintiff's motorcycle was "Ruzaini's car". He said that Ah Wei went to see him at the morgue of the Hospital Tanjung Karang on 3 September 2015 to verbally inform him of the car. SP3 said that although he had asked Ah Wei to do so, Ah Wei did not want to give a written statement or file a police report of the information he had given to SP3 as regards "Ruzaini's car" being involved in the accident.

[16] SP3 said that after receiving the information from Ah Wei, he called Ruzaini to give a statement under s. 112 of the Criminal Procedure Code and from the statement he found that the motorcar mentioned by Ah Wei did not belong to Ruzaini but to his brother, the first defendant. Ruzaini informed

him that the motorcar was stolen on 1 September 2015 and was found on 3 September 2015 at 1am with the front mirror broken, and the bonnet, bumper and mudguard of the car was dented. Ruzaini said that at the time the car was stolen, it was under the control of a person named Mohd Nawal. SP3 did not take a statement from either Mohd Nawal or the first defendant.

[17] The verbal information that SP3 said he had received from Ah Wei is the only information linking the motorcar no. WLD 9999 to the accident. SP3 admitted that Ah Wei was not a member of the public who had witnessed the accident and that he had no reason to be at the Hospital Tanjung Karang morgue when he informed SP3 of the car allegedly involved in the accident.

[18] SP3 said that he went to accident site at about 12.30am on 3 September 2021. He said that he found no evidence showing the involvement of motorcar no. WLD 9999 in the accident and he did not interview anyone at the accident site. All he found at the site was a black coloured "Toyota" mudguard.

[19] The photograph of the mudguard (Gambar C, exh. "P8") taken by SP3 shows that the mudguard at the scene of the accident was a black coloured "Toyota" mudguard. The motorcar no. WLD 9999 is a cream/white MyVi and its mudguard when found on 3 September 2015 was still on the car but was dented.

[20] SP3 testified that the police found that the damages to the motorcar no. WLD 9999 to be inconsistent with the damages to the motorcycle no. BMB 5813 and the result of the inquest investigation was "no further action" ("NFA") for the motorcar no. WLD 9999 as it was found that the said motorcar was not involved in the accident with the first plaintiff's motorcycle.

[21] At the close of the plaintiffs' case, the defendants took the position that based on the testimony of the plaintiffs' witnesses and the evidence before the court, the plaintiffs had failed to prove on a balance of probabilities that their pleaded case that the accident took place on 2 September 2015 and that the accident was caused by the first defendant's motorcar no. WLD 9999 colliding into the first plaintiff's motorcycle no. BMB 5813.

[22] The defendants then submitted that they had no case to answer and elected not to call any witnesses or tender any evidence.

[23] The learned SCJ held that by reason of the defendants choosing to submit that they have no case to answer, they had expressly abandoned their defence to the plaintiffs' claim. She also made an adverse inference under s. 114(g) of the Evidence Act 1950 against the defendants for submitting that it had no case to answer and in failing to produce the first defendant as a

witness. She went to hold that therefore, the plaintiffs had on a balance of probabilities proven their case against the defendant and was 100% liable for the accident and for the injuries suffered by the first plaintiff and the death of his wife.

[24] Learned counsel for the appellant had submitted to the Sessions Court that the Court of Appeal in *Kalai Selvan Arumugam v. Santran Supramaniam & Anor* [2016] 1 LNS 1624; [2017] 1 PIR 1; [2016] MLJU 1088 ("*Kalai Selvan*"), held that in cases where the insurance company has intervened in an action, the main issue before the court's consideration is as below:

> (i) In considering the appeal, the main issue is whether the appellant has proved the case on balance of probabilities against the first respondent. The issue related to the second respondent in the capacity of the insurer is only incidental issue pursuant to the statute relating to Road Traffic Rules 1959. If the appellant fails in the main issue, other issues and/or arguments will be irrelevant in law.

[25] The Court of Appeal in *Kalai Selvan* had made it clear that as in any other civil suits, the plaintiff in an accident case must discharge his burden of proof and prove on a balance of probabilities that the accident was caused by the defendant and that the injuries and damages he suffered were a result of and/or caused by the accident, as required under ss. 101 to 103 of the Evidence Act 1950. It is only after the plaintiff has discharged his burden of proof and proven his case on a balance of probabilities, will the burden of proof shifts onto the insurance company to prove its allegation of fraud.

[26] However, as can be seen from the excerpt of the learned SCJ's alasan penghakiman below, she chose to distinguish the Court of Appeal's *dicta* in *Kalai Selvan* on the basis that in *Kalai Selvan* the insurance company intervened and submitted "no case to answer" after the first defendant in that case had testified but in this instant case the first defendant did not testify and only the insurance company submitted "no case to answer". Paragraphs 30, 31, 34 and 35 of the learned SCJ's alasan penghakiman is reproduced below:

> [30] Mahkamah bersetuju dengan hujahan Plaintif-plaintif bahawa dalam memilih untuk menghujahkan "no case to answer" Defendan Kedua selaku penanggung insurans telah secara langsung mengabaikan Pembelaan Defendan Kedua yang menimbulkan alegasi spesifik bahawa:
>
> a. Tiada kemalangan di antara BMB 5813 dan WLD 9999;
>
> b. Tuntutan plaintif adalah tuntutan palsu;
>
> c. Penipuan Plaintif Pertama dan Defendan Pertama
>
> [31] Mahkamah ini juga, setelah meneliti keterangan-keterangan saksi-saksi mendapati Defendan Kedua gagal untuk menunjukkan penipuan yang diplidkan di dalam pembelaan.
>
> …

[34] Mahkamah ini juga telah meneliti kes yang dirujuk oleh Defendan Kedua iaitu *Kalai Selvan v. Santran a/l Supramaniam & Anor* [2017] 1 PIR [1]. Mahkamah ini berpendapat keputusan Mahkamah Rayuan di dalam kes tersebut dapat dibezakan dengan kes di hadapan Mahkamah ini memandangkan pihak insurans telah mengesyaki terdapat penipuan antara plaintif dan Defendan setelah Defendan dalam kes tersebut telah memberi keterangan. Pihak insurans dalam kes berkenaan telah memohon untuk mencelah dan menghujah "no case to answer". Di dalam kes di hadapan Mahkamah ini, Defendan Pertama tidak hadir memberi keterangan dan hanya pihak insurans yang menhujahkan "no case to answer".

[35] Oleh itu, diatas imbangan kebarangkalian, Mahkamah memutuskan bahawa Plaintif-plaintif telah membuktikan kesnya terhadap Defendan-defendan. Oleh itu, Defendan-defendan bertanggungan 100% terhadap kemalangan itu.

[27] One of the 19 grounds of appeal in the appellant's memorandum of appeal is that the learned SCJ was wrong in law and in fact in allowing the plaintiffs' claim when the plaintiffs had failed to prove the involvement of the first defendant's motorcar in the accident, and for transferring the burden of proof to the defendants before the plaintiffs had discharged their burden of proof.

This Appeal

[28] It is trite that an appellate court ought not to intervene with the trial court's conclusion on primary facts unless it is satisfied the trial judge was plainly wrong. Based on this "plainly wrong test", an appellate court is entitled to examine the process of evaluation of evidence by the trial court and may set aside any decision of the trial court with no or insufficient judicial appreciation of the evidence: see the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1; *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; and *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441.

[29] In any appeal, apart from examining the trial court's process of evaluation of evidence, the appellate court is also entitled under the "plainly wrong test" to examine the trial judge's application of the law in arriving at his decision. If the trial judge was plainly wrong in applying the law or lacked judicial appreciation of the applicable law, the appellate court may set aside the trial judge's decision.

[30] In this instant appeal, the main issues for this court's determination are (i) whether the learned SCJ had sufficient judicial appreciation of the evidence when she concluded that the motorcar no. WLD 9999 was involved in the accident; and (ii) whether she had sufficient appreciation of the law when she held that the plaintiffs had discharged its burden of proof

and proven on a balance of probabilities its case against the defendants because the defendants had chosen to submit that it had no case to answer at the close of the plaintiffs' case. Additionally, (iii) was she correct at law in making an adverse inference against the appellant for not producing the first defendant as a witness?

(i) Did The Learned SCJ Have Sufficient Appreciation Of The Law?

[31] The Federal Court in *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037; [2015] 2 AMR 124 ("*Syarikat Kemajuan Timbermine*"), had occasion to consider where a defendant chooses to submit that it has no case to answer (i) whether it means that the plaintiff has met its burden of proof; and (ii) whether adverse inferences are to be drawn against the defendant from its failure to call any witnesses and to adduce any evidence.

[32] In *Syarikat Kemajuan Timbermine*, counsel for the plaintiff had submitted to the Federal Court that the Court of Appeal was wrong to have disturbed the findings of the High Court as the evidence led by the plaintiff must be assumed to be true when the defendant elected not to call any witnesses. The Federal Court rejected the plaintiff counsel's submission. Azahar Mohamed FCJ (as he then was) in delivering the judgment of the Federal Court held:

> [56] … On these submissions we have two observations to make. *The first is that the principle on which an appellate court could interfere with findings of fact by the trial court is the plainly wrong test* (see *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 and *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785). And *the second is that the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability* the existence of a legally enforceable settlement agreement (see *Ranbaxy (Malaysia) Sdn Bhd v. EI Du Pont De Nemours And Co* [2011] MLJU 1135; [2011] 1 AMCR 857). *In other words, it was upon the plaintiff itself, and certainly not the defendant, to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well-founded before the court grants judgment on the claim* (see *The Fordeco Nos 12 And 17; The Owners Of And All Other Persons Interested In The Ships Fordeco No 12 And Fordeco No 17 v. Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10* [2000] 1 MLJ 449, *Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd And Other Appeals* [2004] 4 MLJ 105 and *Teh Swee Lip v. Jademall Holdings Sdn Bhd* [2013] 6 MLJ 32). It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. *By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law.* In this regard, in adopting the approach of the case of *Storey v. Storey* [1961] P

63, Suriyadi JCA (as His Lordship then was) in *Mohd Nor Afandi bin Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 recognised this to be the case as can be seen from the following passage of His Lordship's judgment:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[57] We therefore agree with the submission of learned counsel for the defendant to the effect that *despite the fact the defendant did not call any witness and that even if the plaintiff's evidence is unopposed (and therefore presumed to be true), this does not automatically equate to that evidence satisfying the burden of proving the existence of the settlement agreement borne by the plaintiff, or mean that the burden of proving on the balance of probabilities no longer applies, or that a case to answer is automatically made out. The evidence adduced by the plaintiff must still be sufficient to prove the existence of the settlement agreement.* This crucial point was overlooked by the learned High Court judge. On the factual matrix of the case, it is patently clear that the plaintiff has not discharged the burden. On this basis, the Court of Appeal was in every respect justified in holding that the learned High Court judge was plainly wrong in making a ruling of law that the settlement agreement had come into existence based on the conduct of both parties. Indeed, the election by the defendant to call no evidence at trial does not preclude the reversal of a plainly wrong findings of the learned High Court judge by the Court of Appeal.

(emphasis added)

[33] The Federal Court's decision in *Syarikat Kemajuan Timbermine* made it clear that the fact a defendant submitted that it has no case to answer and called no witnesses and led no evidence does not absolve the plaintiff from discharging its burden of proof in law. The burden remains with the plaintiff to prove its case before a court can grant judgment on its claim. The Federal Court held the fact the defendant did not call any witnesses does not automatically equate to the plaintiff satisfying the burden of proof. Notwithstanding the defendant's submission of no case to answer, it still remains that the evidence adduced by the plaintiff must be sufficient to prove the plaintiff's case.

[34] On the question of whether adverse inferences are to be drawn against the defendant from the failure to call any witnesses and to adduce evidence, the Federal Court in *Syarikat Kemajuan Timbermine* adopted the principle laid down in *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 MLJ 585; [1998] 4 CLJ 674; [1998] 4 AMR 4079, where the Court of Appeal held that it would not be appropriate to draw an adverse inference where a defendant

elects not to call any evidence unless the plaintiff has proven its case on a balance of probabilities. The Federal Court, following the decisions of the Supreme Court in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, SC and the Federal Court in *Low Kian Boon & Anor v. PP* [2010] 5 CLJ 489; [2010] 4 MLJ 425; [2010] 5 AMR 481, FC, held that adverse inference under s. 114(g) of the Evidence Act 1950 can only be drawn if there is a withholding or suppression of evidence and not merely on account of failure to obtain evidence. It held that it would not be appropriate to draw the inference where there has been no deliberate withholding or suppression of evidence. Azahar Mohamed FCJ (as he then was) said:

> [58] … The statutory basis for the drawing of an adverse inference is s. 114(g) of the Evidence Act 1953 which provides that the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. *Adverse inference under that provision can be drawn if there is a withholding or suppression of evidence and not merely on account of failure to obtain evidence* (see *Low Kian Boon & Anor v. Public Prosecutor* [2010] 4 MLJ 425 and *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492). We do not detect any oblique motive on the part of the defendant in not producing any witnesses. In any event, such an inference would have been inappropriate in the context of the present case. The termination of the agreements took place around thirty years before the filing of the action. We have said earlier, as a commercial case, this was a document-heavy dispute where the pertinent evidence was reduced to writing. *It would not be appropriate to draw the inference where there has been no deliberate withholding or suppression of evidence* as all the relevant documents were in the plaintiff's possession. … Moreover, as regards to the non-calling of any witnesses by the defendant, the ratio in the case of *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 MLJ 585 at p 601 will be applicable in the present case. In that case, Siti Norma JCA (as Her Ladyship then was) in delivering the judgment of the Court of Appeal held that *it would not be appropriate to draw an adverse inference where a defendant elects not to call any evidence unless the plaintiff has proven its case on a balance of probability*. We adopt the principle of law as stated by the Court of Appeal in *Thong Foo Ching & Ors v. Shigenori Ono*.
>
> (emphasis added)

[35] Hence, the learned SCJ was plainly wrong in finding that the plaintiffs had met the burden of proof by reason of the defendants electing to submit that they have no case to answer and not calling any witnesses or adducing evidence. Her finding is contrary to the principles of law laid down by the Federal Court in *Syarikat Kemajuan Timbermine*.

[36] Additionally, the learned SCJ's drawing of adverse inference against the defendants for having elected not to call any witnesses was also wrong at law since the plaintiffs had not proven its case against the defendants on a balance of probabilities. Also, the adverse inference was drawn on account

of the defendants having chosen not to produce any witnesses and not because of any withholding or suppression of evidence. Her drawing of adverse inference against the defendants was wrong at law as it went against the principles of law promulgated by the Supreme Court in *Munusamy v. Public Prosecutor* (*supra*), by the Federal Court in *Low Kian Boon & Anor v. Public Prosecutor* (*supra*) and by the Court of Appeal in *Thong Foo Ching & Ors v. Shigenor* (*supra)* – all decisions which were followed and cited with approval by the Federal Court in *Syarikat Kemajuan Timbermine*.

[37] Moreover, with respect to the learned SCJ, this court is unable to agree with her reasons for distinguishing the Court of Appeal's decision in *Kalai Selvan* (*supra*) and for concluding that the plaintiffs had proven their case. The Court of Appeal in *Kalai Selvan* had made it clear that like in any other civil suits, the plaintiff in an accident case must discharge his burden of proof and prove on a balance of probabilities that the accident was caused by the defendant and that the injuries and damages he suffered were a result of and/or caused by the accident, as required under s. 101 of the Evidence Act 1950. It is only after the plaintiff has discharged his burden of proof and proven his case on a balance of probabilities, will the burden of proof shift onto the insurance company to prove its allegation of fraud.

[38] For all these reasons, this court finds that the learned SCJ did not have a sufficient appreciation of the applicable law and was plainly wrong at law.

(ii) Did The Learned SCJ Have Sufficient Judicial Appreciation Of The Evidence?

[39] The learned SCJ had found that the plaintiffs had proven on a balance of probabilities that the accident took place on 2 September 2015; that the first plaintiff was the rider and the deceased was the pillion rider on the motorcycle at the time of the accident; and the first defendant's motorcar no. WLD 9999 was involved in the accident.

(a) Did The Plaintiff's Prove That The Accident Was On 2 September 2015?

[40] The plaintiffs in their statement of claim had pleaded that on 2 September 2015 the first plaintiff was driving his motorcycle registration no. BMB 5813 and Tan Kiok Sit (deceased) as pillion rider, from the direction of Batu Tiga Sg Terap heading to Hospital Tanjung Karang and when they reached KM 59, Jalan Klang-Teluk Intan, Kuala Selangor, a motorcar registration no. WLD 9999 driven by the defendant, which was heading towards the same direction, hit the first plaintiff's motorcycle from the back and as a result of the accident the first plaintiff suffered injury, damages and loss and the deceased passed away. Paragraph 6 of the plaintiffs' statement of claim is reproduced below:

A Pada **2.9.2015, Plaintiff Pertama adalah secara sah sedang menunggang motosikal** BMB 5813 bersama **Tan Kiok Sit, simati sebagai pemboncengnya** dari arah Batu Tiga Sg Terap menuju ke Hospital Tanjung Karang dan apabila sampai di KM 59, Jalan Klang-Teluk Intan, Kuala Selangor, Selangor Darul Ehsan, motokar WLD 9999 yang dipandu oleh Defendan atau ejen Defendan atau orang gaji Defendan atau orang
B yang memandu dengan keizinan Defendan yang menuju ke arah yang sama telah melanggar motosikal mereka dan/atau Plaintif Pertama dan simati dari arah belakang dan akibat perlanggaran tersebut Plaintif Pertama mengalami mecederaan, kerosakan dan kerugian manakala simati telah meninggal dunia. (emphasis added)

C **[41]** The plaintiffs' main witness during the trial was the first plaintiff ("SP9"). Under cross-examination, the first plaintiff testified that the accident took place on 3 September 2015 and not 2 September 2015 as pleaded in the statement of claim. The plaintiffs did not plead the time of the accident and during the trial, the first plaintiff stated that he could not
D remember the time of the accident. He agreed that he gave two different days of the accident – 2 September 2015 in the statement of claim and 3 September 2015 during the trial. Below are excerpts of SP9's testimony during the trial as regards the date of the accident:

E

2nd Defendant's Counsel:	Tanpa membuat rujukan kepada mana-mana dokumen, boleh bagi tahu tarikh kemalangan bila?
SP9:	Tarikh kemalangan Puan adalah pada 03.09.2015

F …

G

2nd Defendant's Counsel:	Hari ini di Mahkamah kamu beri keterangan tarikh kemalangan sebagai 03.09.2015 tetapi penyata saksi kamu, kamu kata sebagai 02.09.2015. Setuju dengan saya dua tarikh kemalangan yang berbeza kamu telah berikan di Mahkamah. Setuju atau tidak? setuju atau tidak sahaja.
SP9:	Saya setuju.

H **[42]** The Hospital Sungai Buloh medical report (marked as "P9") states that the accident occurred on 3 September 2015. The Pusat Pakar Perubatan UiTM, Kampus Sungai Buloh medical report (marked as "P22") also states that the accident occurred on 3 September 2015.

I **[43]** The referral letter dated 1 October 2015 from Klinik Anita to the A&E Department of TAR Hospital Klang (marked as "P10") for the first plaintiff's patella dislocation, also states that the "alleged MVA (motor vehicle accident) on 3 September 2015" based on what the first plaintiff had told the attending doctor at Klinik Anita.

[44] The orthopaedic consultant from Pusat Pakar Perubatan UiTM, Kampus Sungai Buloh, Dr. Mohd Fairudz Mohd Miswan ("SP8") who had attended to SP9 and who had prepared the medical report in "P22" testified that the date of the accident was 3 September 2015. SP8 said that the date was based on what was informed to him by the first plaintiff and that it was also the date of the accident stated on the reference letter from Hospital Sungai Buloh.

[45] The available documents and the testimony of the witnesses at the trial, including that of the first plaintiff himself, show that the accident had taken place on 3 September 2015 and not on 2 September 2015.

[46] However, the learned SCJ stated in her alasan penghakiman she accepted the IO's testimony that based on his investigation that the accident took place on 2 September 2015. She said that she disregarded the contrary evidence on the Hospital Tanjong Karang medical report (marked as "P4") that stated the accident happened on 3 September 2015 because the first plaintiff was under the influence of alcohol. Paragraphs 20-22 of the SCJ's alasan penghakiman is reproduced below:

> [20] Berdasarkan keterangan-keteranagn ini, Mahkamah menerima keterangan Pegawai Penyiasat yang menyatakan bahawa dari hasil siasatannya, kemalangan berlaku pada 02.09.2015.
>
> [21] Keterangan yang bercanggah yang menyatakan bahwa kemalangan berlaku pada 03.09.2015 adalah pada laporan perubatan terutamanya ekshibit P4 yang diambil dari temubual dengan Plaintif Pertama yang pada masa yang sama berada dibawah pengaruh alcohol. Eksibit P4 juga mengandungi keterangan yang bercanggah yang menyatakan bahawa beliau adalah pembonceng dan isterinya adalah pembonceng dan isterinya adalah penunggang.
>
> [22] Memandangkan SP3 hadir ke tempat kejadian jam 12.30 tengah malam pada 03.09.15 keterangan lebih dipercayai dari apa yang tercatit pada ekshibit P4 yang diambil hasil temu bual antara SP2 dan Plaintif Pertama sewaktu Plaintif Pertama dalam pengaruh alcohol.

[47] In concluding that the accident was on 2 September 2015, the learning SCJ disregarded the first plaintiff own testimony in court where he said "Tarikh kemalangan Puan adalah pada 3 September 2015" (see p. 373 of the Rekod Rayuan Tambahan). The learned SCJ also disregarded the documents in exh. "P9" and exh. "P22", which both state that the accident had taken place on 3 September 2015. Furthermore, she failed to consider SP8's testimony that he was informed by the first plaintiff that accident took place on 3 September 2015 and the fact that the doctor whom the first plaintiff saw at Klinik Anita had stated in the referral letter to Hospital Tengku Ampuan Rahimah, Klang (marked as "P10") that he was informed by the first plaintiff that the accident took place on 3 September 2015. There was no evidence that first plaintiff was intoxicated when he met both these doctors.

A **[48]** The learned SCJ said that she concluded that the accident happened on 2 September 2015 based on the IO's testimony. In doing so, the learned SCJ failed appreciate the IO's (SP3) evidence during cross-examination, where he agreed the time of 11.30pm on 2 September 2015 on the first plaintiff's first police report was what the first plaintiff had stated in the first B police report as the time he and his wife were riding the motorcycle no. BMB 5813 from his house to Hospital Tanjung Karang. It was not the time and the date of the accident.

[49] The plaintiffs had pleaded that the accident took place on 2 September 2015. However, they had failed to provide the necessary evidence to prove C that the accident did indeed take place on 2 September 2015.

[50] The first plaintiff's own testimony and the documents admitted as evidence in court all show that the accident took place on 3 September 2015. The learned SCJ's was plainly wrong in arriving at her finding that the accident took place on 2 September 2015 based on the IO's investigation D when the IO himself testified in court that 11.30pm on 2 September 2015 was not the time and date of the accident but the time and date that the first plaintiff stated in his first police report that he and his wife were riding the motorcycle from his home to Hospital Tanjung Karang. It was clearly wrong for the learned SCJ to conclude the date of the accident based on the IO's E statement, which he had testified was based on his misreading of the first plaintiff's entry in the first police report.

[51] Additionally, it was clearly wrong for the learned SCJ to dismiss the first plaintiff's testimony in court and the written evidence in the medical reports exhibited in court that the accident took place on 3 September 2015 F on the basis that the first plaintiff was under the influence of alcohol when he saw the medical officer (SP2) at Hospital Tanjung Karang after the accident. The basis of her rejection of the evidence were plainly wrong since the first plaintiff was not under the influence of alcohol when he told the doctor at Klinik Anita on 1 October 2015 that the accident happened on G 3 September 2015. Neither was he under the influence of alcohol when he told SP8 on 1 March 2016 that the accident happened on 3 September 2015 or when he testified in court during the trial that the accident took place on 3 September 2015.

[52] In light of the available evidence before her, the learned SCJ's finding H that the accident took place on 2 September 2015 was plainly wrong as it is a finding which cannot be reasonably explained or justified.

I

(b) Did The Plaintiffs Prove That The First Plaintiff Was The Rider And His Deceased Wife The Pillion Rider Of The Motorcycle No. BMB 5813 At The Time Of The Accident?

[53] As can be seen from the extract of para. 6 of the statement of claim above, the plaintiffs plead that the first plaintiff was the rider, and his deceased wife was the pillion rider of the motorcycle no. BMB 5813 at the time of the accident.

[54] However, on the kad rawatan untuk orang sakit (luar) of the Unit Kecemasan & Trauma Hospital Tanjung Karang (exh. "D6") it is stated that the first plaintiff was the pillion rider, and his deceased wife was the rider of the motorcycle at the time of the accident. And on the Hospital Tanjong Karang medical report (exh. "P4") it is stated that the first plaintiff was "pillion rider under alcohol influence, rider was wife."

[55] Dr Rahul Rampal a/l Rahubir Rampal ("SP2"), the medical officer in Hospital Tanjong Karang who had attended to the first plaintiff after the accident, testified that the first plaintiff was first given outpatient treatment at Hospital Tanjung Karang at 12.06am on 3 September 2015 for the accident and for the second time when he came back to the hospital at 7pm on the same day, where he brought a police report stating that he was assaulted by his brothers in law – that he was punched by his brothers in law in the forehead and mouth.

[56] SP2 was asked about the contradiction on whether the first plaintiff was the rider or the pillion rider; his answer was as follows:

2nd Defendant's Counsel:	Under history "he was pillion rider" where did you get this?
SP2:	During the first visit, patient has stated he was the pillion rider, the rider was his wife. However, on the 2nd visit at 7pm the patient stated he was riding the motorcycle and the wife was the pillion rider at the back.
2nd Defendant's Counsel:	He contradicted himself?
SP2:	Yes.

[57] Dr C. Sankara Kumar a/l Chanrasekaran ("SP6"), the orthopaedic surgeon and consultant at UMCC, who had attended to the first plaintiff, testified that the first plaintiff had told him that he was the pillion rider.

[58] The first plaintiff agreed during cross-examination that he had informed SP6 on both occasions that he met SP6 that he was "pembonceng" (pillion rider) at the time of the accident.

[59] The first plaintiff also agreed to the defence counsel's suggestion that his story as to whether he was the rider or the pillion rider of the motorcycle at the time of the accident kept changing. Below is an excerpt of the first plaintiff's testimony:

2nd Defendant's Counsel:	… Kamu ada pergi UMCC hospital untuk dapatkan pakar, laporan pakar? UMCC di Lembah Pantai? Muka surat 29 ke 30. Di sini di muka surat 30, doctor telah katakan bahawa kamu bagi tahu di kamu adalah pembonceng pada masa kejadian dan apabila beliau datang ke Mahkamah, beliau telah sahkan bahawa dua kali kamu jumpa dia, kedua-dua kali pun kamu bagi tahu dia kamu adalah pembonceng pada masa itu.
SP9:	Ya, setuju.
2nd Defendant's Counsel:	Setuju dengan saya, ya, bahawa cerita kamu berkenaan kamu pembonceng ataupun penunggang asyik bertukaran?
SP9:	Ya, setuju.

[60] As with the date of the accident, the learned SCJ had brushed aside the discrepancy in evidence as to whether the first plaintiff was the rider or the pillion rider at the time of accident. She chose to disregard the contemporaneous notes in exh. P4 made by SP2 that the first plaintiff was pillion rider and his wife was the rider on the basis that the first plaintiff was under the influence of alcohol when he met SP2.

[61] The learned SCJ had concluded in para. 22 of her alasan penghakiman (reproduced in para. [46] above) that since SP3 went to the site of the accident at 12.30am on 3 September 2015, his testimony is more believable that what is stated on the medical notes in exh. P4 because the first plaintiff was intoxicated. The learned SCJ does not explain why she finds that because SP3 went to the accident site, the first plaintiff was the rider, and his deceased wife was the pillion rider. It would have been impossible for SP3 to conclude from what he found at the site of the accident as to who was the rider and who was the pillion rider – SP3 testified that all he found at the accident site was the motorcycle, the motorcycle number and "kesan tompokan darah dilabelkan di, pada D. E. kedudukan kesan calar dan C kesan kedudukan serpihan komponen kenderaan berselerakan."

[62] Furthermore, SP3 said that he was not able to identify the exact spot where the body of the deceased was taken from – he said that the body of the deceased was not at the location of the accident when he arrived, so he was not able to identify the exact spot where the deceased's body was taken from.

2nd Defendant's Counsel:	Jadi apabila Inspektor sampai memang satu perempuan Cina yang dipercayai telah meninggal dunia di tempat kejadian, tiada di tempat kejadian apabila Inspektor sampai, betul?
SP3:	Betul, Puan.
2nd Defendant's Counsel:	Jadi Inspektor juga tidak dapat pastikan, ya, mayat satu perempuan Cina diambil di exact spot mana di lokasi, betul?
SP3:	Betul Puan.

[63] If he was unable to identify from his visit to the accident site where the deceased's body was taken from, how was he able to conclude from his visit who was rider or pillion rider of the motorcycle at the time of the accident? More importantly, SP3 never testified during the trial that based on his visit to the site of the accident, he concluded that the first plaintiff was the rider of the motorcycle, and the deceased was the pillion rider. SP3 also confirmed that he did not interview anyone at the site of the accident:

[64] From the evidence before the Sessions Court, it is curious how the learned SCJ was able to make the finding that the first plaintiff was the rider and his wife was the pillion rider based on the fact that SP3 went to the accident site at 12.30am on 3 September 2015.

[65] With respect, it was plainly wrong of the learned SCJ to have made the finding that the first plaintiff was the rider and his deceased wife was the pillion rider at the time of the accident. She appears not to have had sufficient judicial appreciation of the evidence before the court.

(c) Did The Plaintiffs Prove That The Motorcar No. WLD 9999 Hit The Motorcycle No. BMB 5813 On 2 September 2015?

[66] The plaintiffs' pleaded that the motorcar no. WLD 9999 belonging to the first defendant and insured by the second defendant had hit the first plaintiff's motorcycle no. BMB 5813 from the back on 2 September 2015, causing the injuries to the first plaintiff and the death of his wife.

[67] The first plaintiff in his first police report filed on 3 September 2015 at 16:50pm had stated that a motorcar had hit his motorcycle from the back but that he was not sure of the registration number and the make of the motorcar. He had stated in the first police report "tiba-tiba sebuah m/kar no dan jenis tidak pasti yang datang dari arah belakang telah melanggar bahagian belakang m/sikal saya dan membuatkan saya dan isteri saya tercampak di atas jalan raya." The first plaintiff also did not mention the registration number and the motorcar in his second police report.

[68] During the trial, the first plaintiff testified that he cannot remember anything about the accident. He claimed that he was given the details of the motorcar by a member of public and that a member of the public had sent to his handphone *via* WhatsApp a photo of the motorcar that had his motorcycle. But when asked during cross examination, the first plaintiff says that he does not know the name of the person who told him that motorcar no WLD 9999 was involved in the accident and that he had deleted the photograph of the motorcar from his handphone.

[69] The first plaintiff agreed that he was intoxicated during the accident which is why he cannot remember anything about the accident. SP2, the doctor who had attended to the first plaintiff at the A & E of Hospital Tanjung Karang had written in his medical report and had told this court that the first plaintiff was intoxicated when he was brought into the hospital as SP2 could smell alcohol on the first plaintiff's breath.

[70] As discussed in section B above, the plaintiffs' case against the defendants is solely based on the claim by the IO (SP3) that he was verbally told by a tow-truck driver named "Ah Wei" at the morgue of the Hospital Tanjung Karang that "Ruzaini's car" was involved in the accident with the first plaintiff's motorcycle. As can be seen from the exchange below between the appellant's counsel during cross-examination, SP3 informed the court that commenced his investigation on Ruzaini based on what Ah Wei told him:

2nd Defendant's Counsel:	Apa yang telah menyebabkan Inspektor untuk mula siasat melibatkan Ruzaini pada 22.09.2015?
SP3:	Ok. Saya telah dapat satu notis daripada penarik kereta bahawa kereta daripada Ruzaini Kotni.
2nd Defendant's Counsel:	Sorry, kereta Ruzaini Kotni ya.
SP3:	Ok, terlibat, mungkin terlibat dalam kemalangan.

…

2nd Defendant's Counsel:	'Bahawa Ruzaini mungkin terlibat dalam kemalangan'. Jadi saya punya soalan ini, notis daripada penarik kereta yang Inspektor kata ini secara lisan ke bertulis?
SP3:	Secara lisan.

…

2nd Defendant's Counsel:	Siapakah penarik kereta yang dimaksudkan?
SP3:	Ini bukan nama sebenar. Dipanggil Ah Wei.

[71] SP3 confirmed that he connected the motorcar no. WLD 9999 with the accident involving the first plaintiff and the deceased based on what "Ah Wei" told him. He said that he called a person named Ruzaini bin Kotni to give statement under s. 112 of the Criminal Procedure Code based on what "Ah Wei" verbally told him. SP3 said that he did not take a written statement from "Ah Wei" and that he did not have any additional information from "Ah Wei" as to what he meant by "Ruzaini's car" may be involved in the accident. He said that he did ask "Ah Wei" to file a police report, but "Ah Wei" felt that it was unnecessary to make a police report. SP3 under cross-examination disagreed with the appellant's counsel suggestion that it was important that "Ah Wei"make a police report and give a written statement to the police in order to connect "Ruzaini's car" to the accident.

[72] When asked, SP3 informed the Court that there was no reason for "Ah Wei" to be at the morgue of the Hospital Tanjung Karang on the night of the accident and that "Ah Wei" did not give Ruzaini's full name to SP3. SP3 agreed that when he arrived at the location of the accident, there was no evidence showing the involvement of the motorcar no. WLD 9999 in the accident. And as discussed earlier in section B above, SP3 confirmed that he did not interview anyone at the accident site; that the mudguard he found at the scene of the accident was a black coloured Toyota motorcar mudguard, whilst the motorcar no. WLD 9999 is a white/cream coloured MyVi. He also confirmed that the police found that the damages to motorcar no. WLD 9999 to be inconsistent with the damages to the motorcycle no. BMB 5813, and that result of the inquest investigation was NFA as the motorcar no. WLD 9999 was not involved in the accident with the first plaintiff's motorcycle.

[73] Notwithstanding SP3's testimony that the damage to the first plaintiff's motorcycle was not consistent with the damages to the motorcar no. WLD 9999 and the learned SCJ herself during the trial after hearing SP3's testimony having remarked "Betullah. Kerosakkan WLD bahagian kanan motokar tidak konsisten dengan kerosakkan motosikal", inexplicably in her alasan penghakiman, the learned SCJ stated that SP3's investigation concluded that the damage to the motorcycle and the motorcar are consistent!

[74] Intriguingly, the learned SCJ also found that SP3's investigations had shown that the accident on 2 September 2015 involved motorcar no. WLD 9999, even though SP3 had testified that the police findings were that motorcar no. WLD 9999 was not involved in the accident and the result of the inquest investigation was "no further action" (NFA) for the motorcar no. WLD 9999.

[75] The learned SCJ also disregarded the fact that the mudguard found at the accident site was that of a black Toyota, whilst motorcar no. WLD 9999 is a white/cream MyVi and that no evidence was produced before the court to show that the black "Toyota" mudguard was part of the white/cream MyVi motorcar no. WLD 9999.

[76] Paragraphs 23-24 of the learned SCJ's grounds of judgment are reproduced below:

> [23] Mahkamah juga meneliti keterangan SP3 mengenai kerosakan pada kenderaan yang terlibat terutamanya pada gambar N exhibit P8, gambar di mukasurat 123 ikatan B dan hasil siasatannya mendapati kerosakan motorsikal dan motokar WLD 999 adalah selari.
>
> [24] Walaupun di dalam laporan polis Plaintif Pertama tidak menyatakan motokar WLD 9999, hasil siasatan SP3 telah menunjukkan pada 02.09.2015 telah berlaku kemalangan yang melibatkan kenderaan tersebut.
>
> [25] Mahkamah bersetuju dengan hujahan Plaintif Pertama bahawa berdasarkan keterangan SP3 dan kerosakan pada kenderaan-kenderaan motokar WLD 999 terlibat dalam kemalangan ini.

[77] It is indeed curious how the learned SCJ arrived at her conclusion that that the motorcar WLD 9999 was involved in the accident with the first plaintiff's motorcycle, in the face of the evidence before the Sessions Court that the first plaintiff did not know what car had collided into his motorcycle during the accident; that there was no trace of the motorcar no. WLD 9999 at the site of the accident; SP3's testimony that the damage to motorcar no. WLD 9999 was inconsistent with the damage to the first plaintiff's motorcycle; the police findings that motorcar no. WLD 9999 was not involved in the accident; and the result of the inquest investigation confirmed was "no further action" (NFA) was to be taken for motorcar no. WLD 9999 in respect of the accident.

[78] It appears to me that in arriving at her conclusion, the learned SCJ chose to ignore the oral evidence of the plaintiffs' own witnesses, the police reports filed by the first plaintiffs, the findings of the police and the result of the inquest investigation.

[79] Based on the testimonies of the plaintiffs' own witnesses and the evidence at trial, it is patently clear that the plaintiffs had not discharged the burden of proving its pleaded case against the defendants.

[80] For the reasons discussed above, this court finds the plaintiffs had failed to prove on a balance of probabilities the accident happened on 2 September 2015; the first plaintiff was the rider and his deceased wife the pillion rider of his motorcycle BMB5813; and that the motorcar no. WLD 9999 owned by the first defendant had collided into the back of the first plaintiff motorcycle at KM59, Jalan Klang-Teluk Intan, Kuala Selangor, causing the injuries, loss and damage to the first plaintiff and the death of his wife. The learned SCJ was thus, plainly wrong in concluding otherwise.

[81] For all these reasons, this court finds that the learned SCJ was plainly wrong in finding that the plaintiffs had proven its case against the defendants and for holding that the defendants are 100% liable for the accident.

[82] Accordingly, her finding of 100% liability against the defendants merits appellate intervention and should be set aside.

Quantum

[83] The appellant disagrees with the quantum of damages awarded by the learned SCJ for the first plaintiff's right patella dislocation and knee ligament injury, and for his full loss of earnings.

[84] The appellant's case is that the plaintiffs claim for the patella dislocation and knee ligament injuries to the first plaintiff should have been dismissed because the plaintiffs have failed to prove the causal link between the injuries. The appellant argues that the first plaintiff's inordinate delay in seeking treatment and the fact that he did not tell any of the doctors that saw him that he was assaulted by his brothers in law at the hospital after the accident, created reasonable doubt that the dislocation of the first plaintiff's right patella and the injury to his knee ligaments were not associated with the injuries he sustained as a result of the accident.

[85] The appellant relies on the fact that SP2, the medical officer at Hospital Tanjung Karang, did not diagnose the first plaintiff as having dislocated his right patella at the time he first examined the first plaintiff after the accident. SP2 had diagnosed the first plaintiff as suffering from superficial injuries because of the accident.

[86] The first plaintiff's statement as regards his injury is as below:

Question:	Selepas kemalangan, kamu pergi hospital mana?
SP9:	Selepas kemalangan, saya dihantar ke Hospital Tanjong Karang. Di hospital tersebut saya diberi ubat untuk disapu pada kaki saya dan disuruh balik ke rumah. Beberapa hari selepas itu, kaki saya menjadi bengkak. Saya menelefon anak peremptuan saya untuk bawa saya ke sebuah hospital persendirian di hospital swasta di Kapar. Doktor di hospital tersebut telah merujuk saya dengan menulis sepucuk surat ke Hospital Sungai Buloh. …

[87] The clinic in Kapar mentioned by the first plaintiff is Klinik Anita. Dr Koshy Thomas of Klinik Anita on 1 October 2015 had diagnosed the dislocation to the first plaintiff right patella. In his referral letter to Hospital Tunku Ampuan Rahimah, Klang (marked as "P10") the doctor stated "alleged MVA on 3 September 2015 c/o pain right knee. O/e right patella dislocation. Provisional diagnosis: patella dislocation."

[88] Hospital Sungai Buloh had diagnosed the first plaintiff as "right patella dislocation with minimal joint swelling". Hospital Sungai Buloh then referred the first plaintiff to UiTM orthopaedic sports surgeon for further management. The UiTM medical report (marked as "P22") diagnosed the first plaintiff as having a "chronic dislocation of right patella." It was stated that the first plaintiff was planned for surgical intervention and a quotation for surgery was given to him, but the first plaintiff never came back to the clinic after the appointment on 1 March 2016. The first plaintiff in his witness statement said that he did not have any money to undergo the surgery and went to Hospital Klang. The first plaintiff was admitted into Hospital Tengku Ampuan Rahimah, Klang from 3 January 2017 to 12 January 2017 where he underwent a medial patella-femoral ligament construction with hamstring graft. The hospital's medical report shows that he was diagnosed with (i) post-traumatic recurrent right patella dislocation; (ii) partial tear of right medial patellofemoral ligament; (iii) right medial and lateral retinaculum injury; (iv) chondromalacia patella Grade II and IV; (v) partial tear of right ACL and PCL; (vi) posterior joint capsule injury; (vii) right lateral collateral ligament injury; and (viii) right patella tendinosis.

[89] In my view, the time of just under one month between the accident and him being diagnosed by the doctor at Klinik Anita as suffering from right patella dislocation does not amount to an inordinate delay. The plaintiffs' expert, consultant orthopaedic surgeon, Dr C. Sankara Kumar a/l Chanrasekaran ("SP6"), had opined that a soft tissue injury at the knee can definitely build up to a patella dislocation. He explained that this was because "apart from the quadriceps tendon and patella tendon, the patella is supported in laced by two other ligaments known as medial and lateral patella femoral ligament. Should there be injury to these ligaments, the patella can get dislocated in due course or any time later."

[90] Accordingly, I agree with the learned SCJ that the plaintiffs have proven on a balance of probabilities that the dislocation to the first plaintiff's right patella and the injury to his knee ligaments were caused by the accident. However, I do not agree with the learned SCJ's finding that the assault by his brothers in law was an intervening event. This is because the first plaintiff had reported that the assault by his brothers in law was on his forehead and mouth. The assault was not on his legs or knees. Accordingly, I do not find that the assault to be an intervening event that could have caused the dislocation to the first plaintiff right patella and knee ligament injury instead of the accident.

[91] Curiously however, the learned SCJ, although she held the assault to be an intervening event for the injuries, had awarded damages in the sum of RM14,500 for the patella injury and RM18,000 for the knee ligament injury. The amount of damages awarded is within the range recommendation in the Revised Compendium of Personal Injury Awards dated 6 July 2018 for both injuries, so I do not see any reason to interfere with the quantum awarded.

[92] With regards to the first plaintiff's loss of earnings, I am satisfied that the learned SCJ was not wrong to conclude based on the evidence given by the representative of the first plaintiff's employer that he was earning RM3,300 per month as a cook. She was also not wrong in deducting 1/3 of the earnings for his living expenses and applying a multiplier of five years. I agree with her finding that based on the evidence before the court, including the testimony of his employer's representative and the medical expert, that the first plaintiff's job as a cook requires him to stand for long periods of time and because of the injury to his knee he is no longer able to do so. Hence, it would no longer be possible for him to continue working as a cook.

[93] Accordingly, I find there should not be any appellate intervention in the sum of RM132,000 awarded by the learned SCJ for the first plaintiff's loss of earnings.

Decision

[94] For the reasons above, the appellant's appeal against the learned SCJ's finding of liability is allowed.

[95] The learned SCJ's finding of 100% liability against the defendants for the accident is hereby set aside.

[96] For the reasons set out in section D above, the appellant's appeal against the quantum of damages awarded for the first plaintiff's right patella dislocation, knee ligament injury and loss of earnings is dismissed.